

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MTACC, Inc., a California corporation,

Plaintiff,

v.

NEW YORK DEPARTMENT OF
FINANCIAL SERVICES, a New York
state agency, and BENJAMIN M.
LAWSKY, in his official capacity as
Superintendent of the New York State
Department of Financial Services,

Defendant.

No.

**[PROPOSED] ORDER GRANTING
PRELIMINARY INJUNCTION**

Plaintiff MTACC, Inc. dba ePayService (“MTACC”) requests that the Court enter a preliminary injunction enjoining Defendants New York State Department of Financial Institutions and Benjamin Lawsky (together, “NYDFS”) from violating MTACC’s constitutional rights to due process and from unconstitutionally interfering with interstate commerce. MTACC seeks a preliminary injunction enjoining the NYDFS from initiating enforcement proceedings or otherwise imposing a penalty, monetary or otherwise, against MTACC for failure to obtain a New York money transmitter license during the pendency of this matter, or until further order of the Court. For the reasons set forth below, the motion will be granted.

**[PROPOSED] ORDER GRANTING PRELIMINARY
INJUNCTION – 1**

I. BACKGROUND

MTACC is a money transmitter with no connection to New York. MTACC is a California corporation, headquartered in California, with operating offices in Washington and Russia. MTACC has no bank accounts in New York, does not conduct marketing activities in New York, and does not offer MTACC accounts to New York residents. MTACC has no physical presence in New York, and it has never owned property in New York, paid taxes in New York, or had employees in New York.

In response to a request by the Washington Department of Financial Institutions, MTACC submitted a written request to the NYDFS in August 2011, seeking confirmation that MTACC did not require licensure under Article XIII-B of the New York Banking Law, N.Y. Banking Law § 640 *et seq.* (“Article XIII-B”). On July 23, 2013, the NYDFS sent a letter to MTACC concluding that MTACC must obtain a money transmitter license in order to receive funds sent to it by New York companies through a third-party institution (a bank or a New York-regulated money transmitter). Despite MTACC’s request for reconsideration, the NYDFS maintains its position. MTACC filed the present suit seeking declaratory and injunctive relief on claims alleging that the NYDFS’s actions violate MTACC’s rights under the Due Process Clause of the U.S. Constitution and unconstitutionally interferes with interstate commerce.

II. DISCUSSION

MTACC has established that it is “[1] likely to succeed on the merits, [2] that [it] is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in [its] favor, and [4] that an injunction is in the public interest.” *Am. Trucking Ass’n v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). In applying the *Winter* test, the Ninth Circuit balances the elements such that a stronger element of the test may offset a weaker showing on another element. *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011). As set forth below, MTACC satisfies all four elements set forth in *Winter*.

1 MTACC is likely to succeed on the merits of its due process claim. MTACC has a
2 personal “liberty interest in not being subject to the binding judgments of a forum with which [it]
3 has established no meaningful [internal] contacts, ties, or relations.” *Burger King Corp. v.*
4 *Rudzewicz*, 471 U.S. 462, 471-72 (1985) (internal quotations and citation omitted). The NYDFS
5 seeks to deprive that liberty interest by applying Article XIII-B to an activity not regulated by the
6 statute and to a company that is a stranger to New York. “Those who live or operate primarily
7 outside a State have a due process right not to be subjected to judgment in its courts as a general
8 matter.” *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2787, 2780 (2011) (plurality opinion).
9 Here, as in *J McIntyre Machinery*, MTACC has no office in New York. MTACC neither pays
10 taxes nor has it ever owned property in New York, and it has never advertised in or sent
11 employees to New York. MTACC’s services are not open to New York residents. Further, there
12 are two types of activity that trigger the licensure requirement of Article XIII-B: (1) the receipt
13 of money from New York residents for the purpose of further transmitting that money on their
14 behalf, and (2) transmitting money via a wire or electronic transfer on behalf of New York
15 residents. N.Y. Banking Law § 641(1); 3 C.R.R. N.Y. § 406.2(a). MTACC does not engage in
16 either activity, and its activities are therefore beyond the scope of Article XIII-B.

17 Under these circumstances, NYDFS’s enforcement of its regulatory and other powers
18 against MTACC would violate the Due Process Clause’s substantive protections “against having
19 the Government impose burdens upon him except in accordance with the valid laws of the land.”
20 *Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966).

21 MTACC is also likely to succeed on the merits of its dormant commerce clause claim.
22 The NYDFS’s interpretation of New York Banking Law Article XIII-B and related regulations
23 would violate the Commerce Clause of the U.S. Constitution by improperly directly regulating
24 transactions that take place outside New York. *See Edgar v. MITE Corp.*, 457 U.S. 624, 641-42
25 (1982). Furthermore, the NYDFS’s expansive interpretation would place a significant burden on
26 interstate commerce in violation of the dormant Commerce Clause.

27 [PROPOSED] ORDER GRANTING PRELIMINARY
28 INJUNCTION – 3

1 Absent the issuance of a preliminary injunction, MTACC is likely to suffer irreparable
2 harm in the form of a loss of customers, goodwill, and damage to its reputation, both with
3 customers and with regulators in states where MTACC does, or intends to do, business. In light
4 of this likely harm to MTACC when compared to the minimal risk of harm posed to the NYDFS
5 as a result of a preliminary injunction, a weighing of the equities favor granting MTACC's
6 request for a preliminary injunction. Finally, protecting a fundamental liberty interest and
7 preventing undue burdens on interstate commerce through a preliminary injunction are both
8 decidedly in the public interest.
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10 Under the circumstances present in this matter, including the limited nature of the
11 preliminary injunction sought, the constitutional nature of the rights forming the basis of the
12 injunction, and the fact that Defendants are government actors, the Court exercises its discretion
13 not to require any bond from the Plaintiff.
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15 **III. ORDER**

16 Good cause therefore appearing, IT IS HEREBY ORDERED that in the absence of a
17 change in the services offered by MTACC as related to the State of New York:
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19 1. Defendants and each of their officers, agents, servants, employees, and
20 attorneys, along with all persons who are in active concert or participation with
21 Defendants or with any of their officers, agents, servants, employees, or attorneys, who receive
22 actual notice of this Order are hereby enjoined from:
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24 a. initiating any enforcement action against MTACC for failure to obtain a money
25 transmitter license in New York solely for receiving money sent by New York
26 residents through an exempt or other regulated third party; and
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28 b. imposing any penalty, monetary or otherwise, against MTACC for failure to
29 obtain a money transmitter license in New York solely for receiving money sent
30 by New York residents through an exempt or other regulated third-party
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1 2. MTACC shall promptly notify this Court and the parties in the case of any change
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3 in its services as related to the State of New York.

4 3. This Order shall take effect immediately and shall remain in effect during the
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6 pendency of this case.
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13 DATED: _____, 2014

The Honorable
United States District Judge

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21 Presented by:

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24 **PERKINS COIE LLP**

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28 By: /s/ Joseph P. Cutler
29 Joseph P. Cutler, #37234
30 Attorney for Plaintiff
31 MTACC, Inc.
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[PROPOSED] ORDER GRANTING PRELIMINARY
INJUNCTION – 5